

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute and regulations involved	2
Statement	5
Argument	8
Conclusion	14

CITATIONS

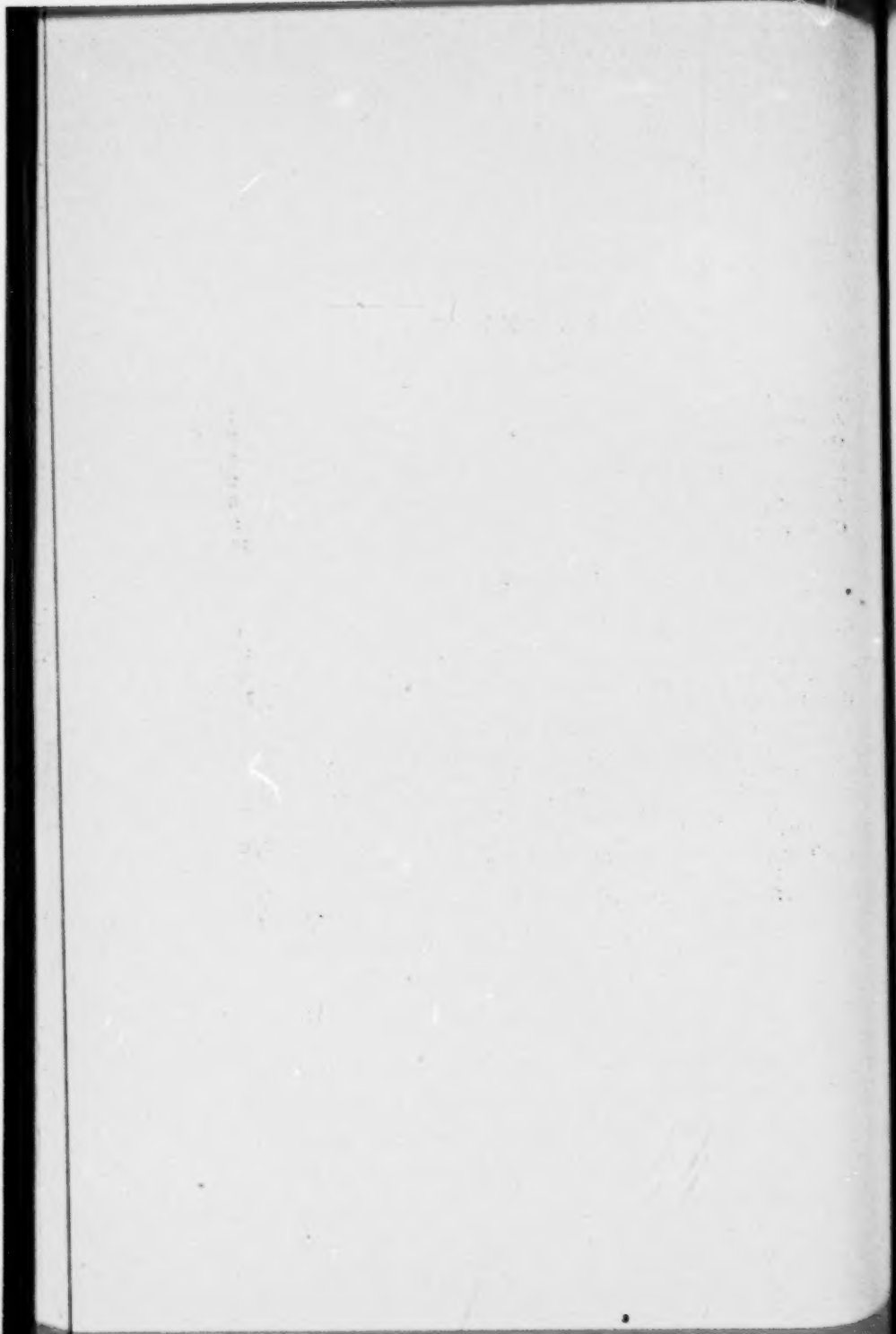
Cases:

<i>Hirabayashi v. United States</i> , 320 U. S. 81	6
<i>McKelvey v. United States</i> , 260 U. S. 353	10
<i>Seale v. United States</i> , 133 F. 2d 1015	10
<i>United States v. Cook</i> , 17 Wall. 168	10

Statutes and Regulations:

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177, 50 U. S. C. App., Supp. III, 633)	2, 3
General Ration Order No. 8, issued March 25, 1943, Sec. 2.8	5, 9
Tire Ration Order No. 1A, issued November 6, 1942:	
Section 1315.801	4, 9
Section 1315.806 (p)	4, 9

(I)



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1126

ARLIE COX, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1127

FRED RAMBO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The appeals in these cases were heard together and were disposed of in one opinion in the circuit court of appeals (No. 1126, R. 153-156; No. 1127, R. 85-88), which is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered March 5, 1945 (No. 1126, R. 157; No. 1127, R. 89). The petitions for writs of certiorari were filed April 7, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictments charging petitioners with transfers of rationed tires in violation of the Second War Powers Act and ration orders issued by the Office of Price Administration, are insufficient because they failed specifically to negative an exception contained in a separate section of the tire ration order.

2. Whether, in their separate jury trials, petitioners were deprived of fair and impartial trials in that the court erred in admitting certain evidence and in instructing the juries.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177, 50 U. S. C. App., Supp. III, 633), provides in part:

(2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

* * * * *

(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Ration Order No. 1A (7 F. R. 9160), issued by the Office of Price Administration on November 6, 1942, pursuant to the authority of Section

2 (a) (8) of the Act of June 28, 1940, as amended (*supra*), provided in pertinent part as of the date of the offenses involved here:

§ 1315.801 *Prohibitions.* (a) *General prohibition.* Notwithstanding the terms of any contract, agreement or other obligation, regardless of when made, no person, unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board, shall:

(1) Make or offer to make, accept or offer to accept, or solicit a transfer of any tire or new tube; or

(2) Use, alter, or change the physical location of any tire or new tube; or

(3) Mount any tire or new tube upon a wheel or rim.

* * * * *

§ 1315.806 * * *

(p) *Transfer and use of non-rationed tires and tubes.* (1) Any person may, without certificate or authorization, transfer, acquire, mount, use, or change the physical location of the following tires and tubes:

- (i) New or used solid tires;
- (ii) Used tractor-implement tires;
- (iii) Grade III tires;
- (iv) New or used tubes;
- (v) Used industrial-type tires.

(2) A consumer may acquire industrial-type tires or tubes for mounting and use on equipment only, without certificate or authorization.

(3) A dealer or manufacturer may transfer industrial-type tires or tubes to a dealer or consumer without certificate or authorization.

(4) The transfer and acquisition of tires or tubes under this paragraph is subject in all cases to, and may be made only in accordance with, the certification requirements imposed by §§ 4600.15 and 4600.17 of War Production Board Order R-1, as amended from time to time.

General Ration Order No. 8, issued March 25, 1943 (8 F. R. 3783), and prescribing general prohibitions and conditions applicable to all ration orders, provides in part:

§ 2.8 *Wrongful acquisition, possession, use or transfer of rationed commodity.* No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rationed commodity acquired in violation of a ration order.

STATEMENT

On September 7, 1944, indictments were returned in the United States District Court for the Eastern District of Illinois against petitioner Cox in six counts and against petitioner Rambo in two counts, charging violations of the Second War Powers Act. The first three counts of the Cox indictment charged that he wilfully and

knowingly transferred to named persons certain described new automobile tires, in violation of Section 1315.801 of Ration Order No. 1A, in that the transfers were not made in accordance with the provisions of that order. Counts 4, 5, and 6 alleged that Cox wilfully and knowingly sold to the same purchasers named in the first three counts a rationed commodity, namely, the same described new automobile tires, not in accordance with the provisions of a ration order, "well knowing that he had not acquired said rationed commodities in accordance with the rules and regulations issued by the Office of Price Administration and was without right and authority to sell the same," in violation of General Ration Order No. 8. (No. 1126, R. 2-6.)¹ The indictment against petitioner Rambo was based upon different transactions than those involved in the Cox case; count 1 charged an offense under Section 1315.801 of Ration Order No. 1A similar to the offenses alleged in the first three counts of the Cox indictment, and count 2 charged a violation of General Ration Order No. 8 similar to that alleged in

¹ There is no occasion in the Cox case to consider whether counts 4, 5, and 6, which are predicated on the same transactions as the first three counts but allege violations of a different ration order than that involved in those counts, charge offenses distinct from the offenses charged in those counts, for the judgment (*infra*, p. 7) is supported by the first three counts. *Hirabayashi v. United States*, 320 U. S. 81, 85, 105, and cases cited.

each of the last three counts of that indictment, but was based upon a different transaction than that involved in count 1 (No. 1127, R. 2-3). At their separate jury trials petitioners were convicted on all counts (No. 1126, R. 98; No. 1127, R. 35). Petitioner Cox was sentenced generally to imprisonment for one year and to pay a fine of one thousand dollars on counts 1 and 2; execution of a general consecutive sentence to imprisonment for one year on the remaining counts was suspended and he was admitted to probation for a period of three years, to commence after the sentence under counts 1 and 2 had been served (No. 1126, R. 113, 122). Petitioner Rambo was sentenced to imprisonment for six months and to pay a fine of five hundred dollars on count 1; execution of a consecutive sentence to imprisonment for six months on count 2 was suspended and he was placed on probation for three years to commence after the sentence upon count 1 had been served (No. 1127, R. 53, 57).

Upon appeals which were heard together and disposed of in a single opinion, the judgments were affirmed by the Circuit Court of Appeals for the Seventh Circuit (No. 1126, R. 153-157; No. 1127, R. 85-89).

While petitioners had separate jury trials, the pattern of the evidence showing illegal sales of tires to various purchasers in violation of the ration orders is the same. Thus, in the Rambo

case, John McGuire, the transferee named in count 1 of the indictment, testified that about August 1, 1944, Rambo met him on the street in Ivesdale, Illinois, and that Rambo said, "he heard I needed a tire, heard I blew out one and wanted to know if I would be interested in one and I said I could use one and I asked him the price and he said \$45.00 and I said I would take one" (No. 1127, R. 11-12). Rambo drove away in his automobile and McGuire followed in his to a point about one mile from town, where Rambo took a tire from the trunk of his automobile and gave it to McGuire, who used it on his automobile (*id.*, p. 12). McGuire testified further that Rambo did not request "any evidence or authority from any ration board" authorizing him to acquire a tire and that he in fact had no such authorization (*id.*, p. 14); that he paid Rambo \$45.00 for the tire (*id.*, p. 13); and that the tire was a "brand new" one (*id.*, pp. 13, 16). There was testimony of similar transactions by one other purchaser from Rambo (*id.*, pp. 20-23) and by five persons who had purchased tires from petitioner Cox (No. 1126, R. 16-21, 31-35, 41-46, 53-59, 60-62). Both petitioners rested without offering any evidence (R. 1126, R. 70; No. 1127, R. 27).

ARGUMENT

The contentions advanced in both petitions for certiorari are identical. In our view they are without merit.

1. Petitioners challenge (No. 1126, Pet. 7, 15-18; No. 1127, Pet. 6, 13-16) the sufficiency of the indictments on the ground that they do not specifically negative an exception contained in Section 1315.806 (p) of Ration Order No. 1A (*supra*, pp. 4-5), permitting the unrestricted transfer of certain tires other than new passenger car tires of the kind described in the indictments. Count 1 of the Rambo indictment and counts 1, 2, and 3 of the Cox indictment are expressly predicated on Section 1315.801 of the ration order, which prohibits, *inter alia*, the transfer of any tire "unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board" (*supra*, p. 4). These counts describe the tires involved as "new," "Grade 1" automobile tires and allege that they were transferred in violation of Section 1315.801. The remaining counts of the indictments are expressly predicated on Section 2.8 of General Ration Order No. 8, which proscribes the transfer (1) of any rationed commodity except in accordance with the provisions of a ration order and (2) of any rationed commodity acquired in violation of a ration order. These latter counts allege, *inter alia*, that the described tires were transferred "not pursuant to or in accordance with the provisions of a ration order." The counts based upon Section 1315.801 of Ration Order No. 1A implicitly refer to tires which are

not freely transferable under that order, in view of the allegation that the transfers were in violation of Section 1315.801; that allegation negatives any possibility that the tires were of the kind described in Section 1315.806 (p) as being transferable without authorization. The counts based upon Section 2.8 of General Ration Order No. 8 specifically allege that the tires involved in those counts were transferred in violation of "a ration order," which, in this case, necessarily refers to the tire ration order, No. 1A. Hence, in respect of all the counts, petitioners were fairly apprised that the tires involved were not of the kind described in Section 1315.806 (p) of Ration Order No. 1A. In any event, it is well settled "that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey v. United States*, 260 U. S. 353, 357. See also, *United States v. Cook*, 17 Wall. 168; *Seele v. United States*, 133 F. 2d 1015, 1019 (C. C. A. 8). Since the exception relied upon by petitioners is contained in a separate section of Ration Order No. 1A, and since it was within petitioners' knowledge whether the tires they transferred were of the kind described in Section

1315.806 (p) of that order, the exception made by that section was properly a matter for petitioners to raise as an affirmative defense; that exception is not so closely incorporated into the definition of the elements of the offense described in Section 1315.801 as to have required that the indictments specifically allege that the transfers were not within the exception.

2. Both petitioners broadly contend (No. 1126, Pet. 18-27; No. 1127, Pet. 16-25) that they were deprived of fair trials because of errors in the admission of evidence and in the court's charge to the jury in each case, but their specifications of errors relied upon show that the contentions are without substantial merit.

Petitioners complain that the court improperly permitted the purchasers of the tires to testify that they were "new" tires, apparently on the theory that the condition of the tires was a matter calling for expert knowledge. We agree with the court below (No. 1126, R. 155; No. 1127, R. 87) that the witnesses "having examined them and having long been familiar with automobile tires, were entitled to testify as to newness, and that testimony uncontradicted, with the jury's own observation of the tires, some of which were in court as exhibits, was entitled to whatever weight the jury chose to give it." Nor, contrary to petitioners' contention, was there any occasion for the court to instruct the juries that the ration

order defined "new" as applied to tires as meaning a tire that has been driven less than one thousand miles. Since the uncontroverted evidence showed that the tires were "new" in the commonly accepted meaning of that word, it was unnecessary to instruct the juries that even if the tires had been used for less than one thousand miles, they were subject to the ration order. Further, since none of the tires involved in either case was of the kind described in Section 1315.806 (p) of Ration Order No. 1A, the court did not err in declining to instruct the juries, as petitioners requested, to give consideration to that section or in specifically instructing the juries that the section did not bear upon the issues before them.

Read as a whole, the charge in each case fully and fairly covered the issues and did not invade the province of the jury, as petitioners contend. In the Rambo case, the judge summarized the allegations of the indictment and explained the nature of the offenses charged (No. 1127, R. 28). He then summarized all the evidence in the case and advised the jury that if petitioner intentionally sold rationed tires in violation of the ration orders, he was guilty of the offenses charged in the indictment (*id.*, p. 29). He further explained the presumption of innocence and the meaning of reasonable doubt and admonished

the jury that the fact that Rambo did not testify should "raise no presumption against him" (*id.*, p. 30). The charge in the Cox case followed substantially the same pattern (see No. 1126, R. 71-76). While the court did not, in this case, give as explicit an instruction in respect of the required intent as it did in the Rambo case, it did impress upon the jury the nature of the charges against Cox and the necessity for the jury to find that he "transferr[ed] rationed tires in violation of the ration laws" before they could convict him (*id.*, pp. 71, 72, 75). While the charge might have been more explicit in defining the element of intent, petitioner did not except to the charge in this respect or in any other manner afford the trier of fact an opportunity to amplify the charge (see *id.*, p. 76). In these circumstances, we submit that the inadequacy of the charge in this respect does not merit further review by this Court. Cox could not have been prejudiced, for all the evidence in the case shows that he was engaged in the illegal sale of tires over a period of several months; that his sales were made in the secrecy that ordinarily accompanies conscious wrongdoing; and that the prices he received for the tires were so exorbitant as to compel the inference that he was purposefully violating the ration orders to reap a financial profit from the tire shortage. In short, there is no basis for the



jury to have found that Cox was an unwitting violator of the ration orders.²

CONCLUSION

Petitioners were properly convicted on undisputed evidence that they sold tires in violation of the ration orders. The cases present no question of general importance or conflict of decisions. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

APRIL 1945.

² Petitioners' further complaints of the court's refusal to give additional instructions requested by them are without merit, either because the instructions requested were embodied in substance in the charges in chief or because they were irrelevant (No. 1126, compare Pet. 21-22 with R. 71-76; No. 1127, compare Pet. 19-20 with R. 28-31).

